



ARBITRATION AWARD

PHSDSBC
PUBLIC HEALTH AND
SOCIAL DEVELOPMENT
SECTORAL BARGAINING
COUNCIL

Panelist/s: Advocate Ronnie Bracks
Case No.: PSHS393-10/11
Date of Award: 7 June 2011

In the ARBITRATION between:

PSA obo Lefosa M

(Employee)

and

Department of Health- Gauteng Province

(1st Respondent)

Employee Representative: PSA obo Lefosa M

Employee's address: P.O. Box 30686
Braamfontein
2017

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Company/Employer representative: Department of Health- Gauteng Province

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DETAILS OF HEARING AND REPRESENTATION

A. The Arbitration was scheduled for hearing at the Respondent's office at Bank of Lisbon Building 14th Floor, cnr Sauer and Market Streets, Johannesburg on 27 May 2011. The Employee was represented by Mr Ntshembe, a legal representative. Mr Sipiwe Mazibuko, the Labour Relations Officer of the Employer represented it. *The proceedings were recorded both manually and electronically.*

ISSUE TO BE DECIDED

B. Whether or not the Applicant was dismissed and if so whether or not the dismissal was fair

BACKGROUND TO THE ISSUE

C. The Applicant was employed in the National Treasury when he applied for the position with the Respondent. He was interviewed for the position which was on a contract basis for three years. At the interview he raised his concern and was assured that even though it was for the 3 year period it could go on for longer as this was the trend and he was comfortable with that. Part of the agreement was that during the contract period the Applicant would be subject to performance evaluations. This did not transpire despite him having drawn his superior's attention to this through various communications. He commenced employment on the 1st July 2007 as Director Asset Management, earning R502 000 per annum.

D. Towards the end of his contract he was offered alternative positions which he refused, his staff was prevented from reporting to him and eventually he was told that his contract will not be renewed. He had also noticed at the time that curriculum vitae were sent for the position he was in. At the end of his contract the position which he occupied was advertised and he did not apply for it.

E. According to the Applicant he was dismissed when the Respondent refused to renew his contract as he was given an undertaking that the position would become permanent and that he would be appointed therein. The Respondent denied that he was dismissed and said that his contract was of a fixed term nature and came to an end.

SURVEY OF EVIDENCE AND ARGUMENT

EVIDENCE

Documentary

F Bundles of documents numbered A, and R were submitted by the parties

Employees' Evidence:

Makoanyane Lefosa after being sworn in testified as follows:

G. He was referred to A1 (his letter of appointment) and explained that he was transferred from Treasury. The contract was fixed for three years. After being referred to A2 he said it was the performance agreement which had he entered into. When he went to the interview he knew that it was for a three year period and that is why at the interview he raised his concern that he was a permanent employee. He was assured that the Asset Management function was an alone standing position and its status would be considered at the end thereof depending on the performance. He was confident that he would be permanently appointed as he was normally a good performer. He only joined the Respondent on the undertaking given at the interview.

G.H. The Applicant gave a detailed explanation regarding the failure by the Respondent to conclude the performance agreement despite his own efforts to get it done. He also explained his difficulty in respect of the various managers he had. The witness stated that he was extremely frustrated by all of this. Since this evidence is a matter of record it not repeated but summarised. According to him in the absence of a performance contract he was not specifically told what was required of him so he mainly relied on his pervious experience.

H.I. In respect of A94 he said this arose from an audit in the department because he had proposed the replacement of one company with another due to the poor service which the existing company was giving. A98 reflected the audit's findings. He had drawn the department's attention to this.

H.J. The witness then gave a detailed explanation about his communications regarding his performance contract, who he had engaged and the responses given. A101 he said was a policy which he had drafted and he gave evidence in respect of what had transpired surrounding this issue. As this is also a matter of record it will not be repeated but is noted. The Applicant concluded by stating that neither the performance agreement nor the management policy was concluded.

J.K. He identified A126 as a written warning to which he denied the allegations and said that he had confronted his supervisor who informed him that Mr Appels had requested that the Applicant be given a warning. He appealed the warning but the appeal was never heard. He referred to A109 which he said was an application for his position.

K.L. Referring to A122 the Applicant said he was invited to a meeting by the CFO but on his arrival on the day he was stopped from attending. He queried this with his supervisor who seemed to be unaware of the meeting. After a conversation with one of the attendees Mr Aslan Raghan, he was informed that the attendee was instructed not to report to the Applicant and this was confirmed by A123 & 124.

L.M. In respect of A133 he said it was a transfer letter. He could not understand the reason for the transfer as he had not requested the transfer nor was he consulted in respect thereto. He raised it with his supervisor. He also approached his union and they raised the Applicant's concern. He read A138 and said he had drafted the document and explained it. These were resolutions to the problems which were being experienced but they could not be implemented.

M.N. He explained the discussions he had with Mr Ramana and the e-mails. He also explained that he took the issues up with Mr Ian van der Merwe who was not aware of the issues. He was referred to A163 and said he wrote it after van der Merwe requested him to do so and promised to take it to the HOD.

N.O. He was then invited to a meeting with Nkomo and Butshingi where he tabled his case. This was followed by A165 to which no response was received but he was told that his contract would not be extended. The union then filed a grievance on his behalf (A168 and 174) There was no response to these. He then wrote A178.

Q.P. The Applicant then referred to A185 which were questions raised by the office of the Auditor General. He got these questions from a colleague. He denied that the response given was correct. In respect of A190 he said that the company which was eventually appointed was one which he had suggested be appointed. He said A218 was the advert for his position. There was clearly the need for someone in the position. He said that it became apparent that there was a crusade to get him out of the department; staff had to commit to the CFO not to report any longer to him.

P.Q. The Applicant stated that he wanted to have either his contract renewed or permanent absorption.

Employer's Evidence

The Respondent called one witness who testified after being duly sworn in:

Shaunese Jackson testified as follows:

Q.R. She was the Applicant's PA and was appointed through an agency which was taken over by Cozens. In November 2009 she together with other staff with the exception of Isaac were later absorbed. She had lodged a grievance against the Applicant because of the stress and pressure she had previously absorbed from the Applicant. As a result she was booked off for two weeks.

CLOSING ARGUMENT

Due to the length of the closing arguments of the parties it will not be repeated in detail; only the salient points will be recorded here. The full version can be found in the file.

ARGUMENT BY Applicant:

R.S. The Applicant's representative submitted in summary that:

- An undertaking was made in an interview that if Applicant performs well and if there is a need for the unit to be independent, he will be made permanent or that his contract will be renewed;
- The Applicant was never confronted with allegations of poor performance;
- On enquiring about Applicant's position, he was informed that it's the practice within the Respondent to be on contract and thereafter be made permanent and that the same principle will be applied to him;

- Applicant had indicated his willingness and the availability to continue in the position as there was a need for the position;
- Reference was also made to various other issues.

ARGUMENT BY Respondent:

S.T. The Respondent's representative submitted that:

- The Applicant was appointed on a fixed term contract for a period of three years and the contract was very explicit.
- The contract commenced on the 1st July 2007 and expired on the 30th June 2010. It was not renewed so there was nothing unfair.
- There was no evidence to prove that the contract will be observed. There are letters informing him his contract will not be renewed.
- The position was advertised and despite him not being excluded from applying he failed to do so. There was no expectation given it will continue as he was informed it will come to an end.
- The Respondent prayed that the matter against it be dismissed.

ANALYSIS OF EVIDENCE AND ARGUMENT

1. Section 192 (1) of the Labour Relations Act, 66 of 1995 stipulates that in any proceedings concerning any dismissal, the employee must establish the existence of the dismissal. The onus was therefore on the Applicant to show that he was dismissed.
2. Since most of the facts are a matter of record these will not be repeated. The common cause facts were that the contract was for a fixed term for three years. At the end of the period it was not renewed and it is alleged that a legitimate expectation was created for renewal. The Applicant therefore alleged that the failure to renew his contract constituted a dismissal.
3. In *Dierks v University of South Africa* (1999) 20 ILJ 1227 (LC) the Labour Court defined "reasonable expectation" as expressed in section 186(b) of the Labour Relations Act to include the following considerations:
 - It is essentially an equity criterion, ensuring relief to a party on the basis of fairness in circumstances where the strict principles of the law would not foresee a remedy.

- 'The Labour Relations Act envisages the existence of a substantive expectation, to the extent that the expectation must relate to the renewal of the fixed-term contract.
- The expectation is seen to be essentially subjective in nature and, therefore, vests in the person of the employee. The employer need not share the same expectation.
- The courts must apply an objective test to determine whether continued employment had indeed become permanent and whether the employee could hold the alleged reasonable expectation of continued employment.

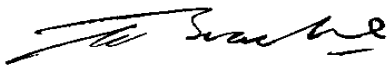
- 4 In the present case the Applicant alleged the undertaking was made at his interview and that the Respondent had promised to do the performance appraisal but failed to do so. I have considered this evidence and I am not convinced by the Applicant's evidence that he still relied on the undertaking he was given at the initial interview. The Applicant's own evidence was that he was offered a transfer to the position of security director (A133) without him having applied for this and his union had to intercede. It is interesting that in both the letters from the union (A135 and 136) no mention is made that there was an undertaking to appoint him in his present position on a permanent basis. The major concern was that he did not have the knowledge for this position and that he was not consulted. What is further more interesting is that in the letter dated 6th February 2010 the union stated "After discussing the transfer with the PSA Mr Lefosa wishes to be provided with the following information and clarity before he can accept the transfer." Nowhere is mention made of the fact that he was expecting to be permanently appointed in the present position. It is clear that the Applicant was considering the alternative position.
- 5 Furthermore the Applicant alleges that he was not aware that there was an issue with regard to his performance because no formal appraisal was held. When one considers the evidence presented this clearly shows that there were various issues between the Applicant and the Respondent which resulted in the Applicant being given a final written warning on the 26th January 2010. In fact the letter to which I refer mentioned the CFO has a grudge against the Applicant. These were clearly signs that the contract was under threat. What should have further been a clear sign that the Applicant would not be permanently employed should have been the new position which followed the warning.
- 6 On the 21st April 2010 the Applicant is sent a confirmatory letter that his contract would expire on the 30th June 2010 and he is requested to collect and submit the required termination forms by no later than the 30th May 2010. The letter concluded with "Do not hesitate to contact this office if clarity is required. In his responses the Applicant does not protest that he was given an undertaking that the position would be permanent. All that he required from Ramaano was a meeting because his contract was ending. The situation becomes even more interesting in that he writes an appeal letter on the advice of the Human Resource department. Once again in the appeal letter he does not mention that there was an undertaking that he would be permanently appointed (A165). His motivation is that he had worked there his entire life and he requested to be permanently placed as there is lots of work. This is an entirely different reason from what he presented at the hearing. It is therefore clear to me that not even the Applicant himself had proven that subjectively he believed there was a legitimate expectation to be appointed permanently.
- 7 The Applicant stated that he was dismissed because he was not permanently appointed after a legitimate expectation was created and for the reasons already stated I am not convinced. What was

even more surprising was the Applicant's failure to apply for the position when it was advertised. If he had applied and had raised his concern after not being considered the situation would have been completely different as this was now an opportunity to have a permanent position.

- 8 For the reasons stated above it is my view that the Applicant had failed to discharge the onus of proving that he was unfairly dismissed.

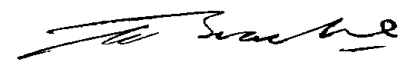
AWARD

The case against the Respondent is dismissed



Adv. RONNIE BRACKS

PSHSBC Senior Panelist



Adv. RONNIE BRACKS